



A solution without a problem?

While the UK's signing of the Singapore Convention has been welcomed, how much practical change will it bring about?

John McElroy weighs up the impact on parties to mediation

IN BRIEF

► The UK's signing of the Singapore Convention has generally been welcomed, but it is unlikely to result in major changes for parties participating in mediation in the UK.

► Compulsory mediation in practice will have some benefits but, if extended to the highest value cases, could also waste time and resources.

On 3 May 2023, the UK signed the Singapore Convention on Mediation (formally the United Nations Convention on International Settlement Agreements Resulting from Mediation). The UK's ratification of the Singapore Convention will result in an alternative procedure for enforcing settlement agreements achieved by mediation anywhere in the world in the English courts. Signing the Convention is part of the UK government's strategy to increasingly adopt measures supporting alternative dispute resolution (ADR).

The Convention enables a party to a mediated settlement agreement to apply to the courts of a country which is a signing party to the Convention to enforce the terms of that agreement, without having to resort to court proceedings for breach of contract. It only applies to international settlement agreements resulting from mediation, concluded in writing by parties to resolve a commercial dispute.

In order to satisfy the 'international' condition, the place of business of either:

- a. at least two of the parties to the settlement agreement must be in different states; or
- b. all of the parties must be from outside the state:
 - i) in which a substantial part of the obligations in the settlement agreement is performed; or
 - ii) with which the subject matter of the agreement is most closely connected.

As a result, mediated settlement agreements relating to non-commercial matters, such as family or neighbour disputes, are outside the scope of the Convention.

The Convention is non-reciprocal, meaning that it applies to settlement agreements entered into pursuant to a mediation conducted anywhere in the world, regardless of whether the state where the mediation took place has ratified the Convention or not; this is an unusual feature for legal instruments of this type. By signing the Convention, states commit to enforcing eligible agreements concluded in any jurisdiction, even if that state has not also signed the Convention.

The UK's signing of the Singapore Convention has generally been welcomed and viewed as a positive development and is likely to encourage other non-signatory states to sign the Convention, which will improve the reach and effectiveness of the Convention.

In practice, however, the Convention is unlikely to result in major changes for parties participating in mediation in the UK. Due to the Convention's non-reciprocal nature, mediated settlement agreements reached in the UK are already enforceable in other states that have signed the Convention. The effect of the UK signing the Convention is that foreign mediated settlement agreements will be enforceable in the UK, as long as they fall within the scope of the Convention. Practically, it also provides a 'forum-shopping' tool, as aggrieved parties can choose the jurisdiction in which to enforce the relevant agreement based on where the breaching party holds readily available assets.

Importantly, breaches of agreements reached in mediation are not particularly common. It is rare for a mediated settlement agreement to require enforcement by courts, as the settlement terms have been agreed between the parties voluntarily; this is in contrast to arbitration awards, for example, which are imposed upon the parties (having previously agreed to arbitrate rather than litigate any disputes). In addition, where a party is in breach of a mediated settlement agreement, the other party is already able to enforce the agreement in court by suing for breach of contract.

Despite the limited practical impact of the Convention, the undeniable benefit is that it will result in a procedural advantage,

by providing an international streamlined mechanism to enforce mediated settlement agreements, without requiring lengthy and costly proceedings to establish breach beforehand.

Litigation as a last resort

In parallel to the execution of the Singapore Convention, the English judiciary is increasingly encouraging parties to engage in mediation and other forms of ADR, with the aim of avoiding litigation where possible. The Civil Procedure Rules are designed to encourage settlement without the need for proceedings to be issued; for example, the Practice Direction on Pre-Action Conduct and Protocols makes clear that litigation should only be used as a last resort, and that parties should consider whether negotiation or other forms of ADR might enable the parties to settle their dispute without commencing proceedings. Even if proceedings are initiated, the Practice Direction encourages parties to continue considering the possibility of reaching a settlement.

The effect of these requirements is that courts are entitled to seek evidence of ADR having been considered by the parties and of steps taken to resolve the dispute outside of court. Parties are now required to state whether they want to attempt to settle when completing the directions questionnaire, and they may request a stay in order to engage in ADR. In addition, although this is rare, the courts may propose mediation on their own initiative.

Solicitors are now also required to advise their clients in relation to settlement options. Not only can a solicitor's failure to advise their client about ADR amount to a breach of their professional obligations, but an unreasonable refusal by a party to participate in ADR is likely to lead to adverse costs orders. Case law shows that the courts will not accept ill-founded reasoning for a refusal to mediate. When determining whether a party has acted 'unreasonably' in refusing to participate in ADR, the court will consider the following non-exhaustive list of factors (commonly known as the *Halsey* principles):

- ▶ the nature of the dispute;
- ▶ the merits of the case;
- ▶ the extent to which other settlement methods have been attempted;
- ▶ whether the costs of mediation would be disproportionately high to the sums at stake in the litigation;
- ▶ if the mediation is agreed close to trial, whether it would delay the trial; and
- ▶ the prospects of success at mediation.

In mainstream commercial cases, there is no current obligation for parties to engage in ADR, unless explicitly provided for in the contract, eg by way of a dispute escalation clause. Such clauses commonly provide for disputes between the parties to be resolved in stages—for example, by mandating the use of ADR before resorting to arbitration or litigation. While ‘agreements to agree’ are generally not legally enforceable, dispute escalation clauses will constitute a contractual obligation if they are sufficiently precise, defined and clearly drafted.

Compulsory mediation on the horizon

Following public consultation in 2022, the UK government confirmed on 25 July 2023 that it is proceeding with plans to automatically refer parties involved in county court civil disputes of up to £10,000

for a compulsory free mediation session provided by the HMCTS. If a party fails to comply with the requirement to mediate, the court will be able to impose a suitable sanction at its discretion, including cost sanctions and strike-out of the party’s claim or defence. Importantly, the government’s consultation response signals an intention to expand the compulsory mediation scheme to higher value claims in the county court in due course, although such an expansion would involve referring parties to external mediators rather than those employed by the HMCTS. The reform will provide a useful pilot for a broader compulsory mediation scheme in the UK and, depending on its success with more straightforward claims, there may be an argument in favour of introducing such a scheme for complex, high-value commercial claims.

The idea of compulsory mediation is controversial, however. Arguably, forcing parties to mediate where it is clear the parties will not reach agreement may lead to time and resources being wasted. On the other hand, compulsory mediation may remove the stigma of being the first party to propose it, which might encourage more parties to engage in mediation overall, or at an earlier stage.

Another alternative could be for the civil courts to adopt the voluntary judicial

mediation scheme now in place in the employment tribunals in England and Wales. Judicial mediation involves bringing consenting parties together for mediation in private before a judge, who remains neutral and attempts to assist the parties reach a resolution, and is precluded from any further involvement in the case. The statistics show that over 65% of claims mediated by a judge reach agreement on the day of mediation, with most of the remaining claims settling before the final hearing, due to the impetus created by judicial mediation. While this would obviously take up court resources, it should in theory result in less time and costs being incurred by the court system overall.

While compulsory mediation might well make sense for the resolution of small claims, it is unlikely to be embraced by parties or legal advisers involved in high-value, complex disputes, particularly those involving dishonesty or fraud. A less dictatorial option might be to pilot voluntary judicial mediation in the High Court, which, if well received and successful, could then be expanded.

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